

September 11, 2008

Mr. Genero Argenio, Chair
New Windsor Planning Board
555 Union Avenue
New Windsor, NY 12553

Re: J Street Subdivision Proposal for the Reserve

Dear Chairman Argenio and Members of the Planning Board:

On behalf of our client, the City of Newburgh, we are submitting the following comments on the proposal to construct an additional 13 homes within "The Reserve," a development project also known as the Mount Airy Estates and located on the banks of Brown's Pond. Over the past seven years, the Mount Airy developers have repeatedly failed to take adequate steps to protect the water quality of the adjacent Pond. These failures have led to illegal discharges of sediment into a critical drinking water resource, raising turbidity levels and reducing water quality within the Pond.

The Planning Board should not approve additional construction until the developer can demonstrate that it has fully implemented its most recent stormwater management plan, that this plan is adequate to manage the stormwater run-off from on-going construction and that it has the legal right to build and maintain its stormwater retention basins in their current location. In addition, given the location of the proposed addition and the planned stormwater management controls, the Planning Board must consult with both the Orange County Planning Board and the City of Newburgh during its review of this expansion.

The Mount Airy development has an unfortunate history of inadequately controlling stormwater discharges from its site. The Department of Environmental Conservation (DEC) issued Notices of Violation in 2002 and 2004 for improper discharges to Brown's Pond which resulted in violations of state water quality standards for turbidity. These violations were resolved through Consent Orders that imposed fines and required the developer to comply with its existing Stormwater Pollution Prevention Plan (SWPPP). However, the development has continued its pattern of improper stormwater management. DEC noted problems at the site, including failure to fully implement the SWPPP, discharges to Brown's Pond and visible increases in turbidity, on 11 occasions since the last Consent Order was entered. The most recent problems were noted in a May 2008 inspection. While DEC did not require changes in the Mount Airy



SWPPP in its enforcement actions, the United States Army Corps of Engineers (US ACoE) and the New York Attorney General have. In 2006, the developer violated federal law by placing fill in a wetland. The resolution negotiated with the US ACoE and the Attorney General required the developer to restore the damaged wetlands and to improve its SWPPP by adding dry detention basins on the project site and improving other detention basins adjacent to Brown's Pond. These measures should have been completed by early August.

Brown's Pond is a critical drinking water resource for both the City of Newburgh and the Town of New Windsor and is valuable, in large part, because it's relatively protected from development-related stormwater discharges. In fact, New Windsor has recently begun drawing water directly from Brown's Pond in response to turbidity problems in its primary water source. Both the City and the Town have a strong interest in maintaining and, in fact, improving the water quality of Brown's Pond. If the Mount Airy development continues to have stormwater management problems leading to increased turbidity within the Pond, this valuable resource is at risk.

The additional stormwater management provisions required under the agreement with the Army Corps of Engineers may resolve the long-standing problems on this site. However, given the history of impermissible discharges and improper stormwater management and the importance of Brown's Pond, we do not believe that new subdivisions and additional construction within the development should be permitted until the effectiveness of the new measures has been assessed over the course of a full year.

Regardless of their effectiveness, it appears that the two main stormwater detention basins may have been constructed on City-owned property. The original Mount Airy developer negotiated an easement across this property for the purposes of draining stormwater into Brown's Pond, for the construction of culverts and headwalls and for some grading of the property to keep stormwater from flowing onto neighboring properties. The construction of two large and permanent stormwater detention ponds appear to fall outside the uses permitted under this easement. If so, the developer will have to dedicate other open lands within the development to stormwater management. The area proposed for this additional subdivision is one of the only remaining open spaces within the development area that could be used for this purposed.

Along these same lines, the developer is proposing a temporary turbidity barrier within Brown's Pond itself. Again, the City of Newburgh, which owns Brown's Pond, has not been consulted about the placement of this barrier and has not granted permission for such use of its property. No subdivision plan that relies on an unauthorized use of a third party's property can be approved. The Town of New Windsor must delay any review of this subdivision until the City of Newburgh has been able to evaluate the proposal and determine whether it should be allowed.

Finally, based on the drawings submitted to New Windsor, portions of the proposed subdivision fall within 500 feet of Brown's Pond, which is a regional recreation area used for fishing and boating. Accordingly, this subdivision proposal must be referred to the Orange County Planning Board for its review and comment. Gen'l Mun. Law § 239-n(3)(a)(ii).

We urge the Town Planning Board to disapprove the proposed subdivision or to delay review until the developers demonstrate that the additional stormwater management controls that will be or have recently been implemented will be effective in preventing improper and damaging discharges of sediment to Brown's Pond. In addition, the Mount Airy developers should be required to demonstrate either that they were legally entitled to build their stormwater detention ponds in their current location, that they have obtained permission to maintain these structures on City property or that these structures can be moved to other locations within the existing development before being allowed to go forward with this project. Finally, as part of its review process, the Town Planning Board must consult with the Orange County Planning Board and ensure that the design has the approval of the City of Newburgh, given the configuration of the proposed subdivision and associated stormwater management controls.

Very truly yours,



Marc S. Gerstman

cc: Hon. Mayor Valentine and Members of the City Council
Hon. George A. Green, Town Supervisor
Hon. Edward A. Diana, Orange County Executive
Hon. Commissioner Jean M. Hudson, Orange County DOH
Mr. David E. Church, Commissioner, Orange County Planning Dept.
Mr. Willie Janeway, Regional Director, NYSDEC Region 3
Mr. John Parker, Esq., NYSDEC Region 3